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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

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# No. 217

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SUPERIOR FILMS, INCORPORATED,
*Appellant,*

*vs.*

DEPARTMENT OF EDUCATION OF THE STATE OF OHIO, DIVISION OF FILM CENSORSHIP, CLYDE HISSONG, SUPERINTENDENT

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APPEAL FROM THE SUPREME COURT OF OHIO

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## STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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## STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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Appellee, in the above entitled cause, for its statement in opposition to appellant's statement as to jurisdiction herein, and in support of appellee's motion to dismiss or affirm, respectfully shows the following:

### Statement of Issues on Appeal

Appellant claims that the film censorship statutes of the State of Ohio are, as they have been applied to it, violative of the United States Constitution in that they impose a prior restraint on freedom of expression, impose an invalid

tax upon such expression, and are so indefinite that they fail to provide procedural due process of law. In addition, appellant on this appeal raises a question of equal protection of the laws.

The Supreme Court of Ohio rejected appellant's challenge of the statute. In so doing the Court took the position that:

> 1. The motion picture is entitled to the protection of the First Amendment, but under the decision of *Burstyn* v. *Wilson*, 343 U. S. 495, an area of constitutional regulation may exist when the state can show a proper interest deserving of protection.
>
> 2. The unique impact of the motion picture, and the unrestricted audience to which it is shown, placed in combination with subjects which are obscene, immoral or which tend to promote crime or riot present an area of proper interest for constitutional regulation by the State of Ohio.
>
> 3. Although the precise language of the Ohio statute had been upheld and subsequently approved by the Supreme Court of the United States, so far as its definiteness was concerned, nevertheless, during forty years of administration and litigation, the statute had acquired an even more specific and circumscribed meaning in that licenses could be denied to only those motion pictures which were obscene, immoral or which tended to promote crime or riot.

This was the rationale of the decision appealed. Other aspects of the decision will be treated *infra*.

Two matters must be stressed at the outset:

> 1. This cause presents a situation of *denial of a license*. There is here no revocation of a license, nor a threat of revocation. The issue then is of the state's constitutional power under the licensing provisions of the statute.
>
> 2. The Supreme Court of Ohio has interpreted the statute in question as permitting denial of a license

only in those instances where the motion picture is found to be obscene, immoral or in those instances where it will tend to promote crime or riot. On page 12 of the opinion of the Supreme Court of Ohio, as it is attached to Appellant's Statement as to Jurisdiction herein, the Court stated:

> "Furthermore, the tests of the censorship statute have over a period of over 40 years acquired a definite and circumscribed meaning.
>
> "As stated in defendant's brief, 'the standards have enjoined the obscene, the immoral, and that which tended to promote crime or riot, judged in relation to the impact and the audience. The experience of the past decade indicates that not one of the forty-four films rejected fell outside of that test.' "

(See Page 24 of the Appellant's "Statement as to Jurisdiction.")

Thus we have the frame of reference within which the issues of this appeal are drawn.

**This Court Lacks Jurisdiction of That Portion of the Appeal Which Asserts That the Ohio Statute Denies to Appellant the Equal Protction of the Laws for the Reason That Such Issue Was Neither Presented to Nor Decided by the Supreme Court of Ohio.**

It is elementary that review by the Supreme Court of the United States is limited to the specific federal questions which were properly raised in the state courts. *Whitney* v. *California*, 274 U.S., 357, 362-3. Examination of appellant's Amended Petition herein discloses no allegation of denial of equal protection of the laws. Nor did the Supreme Court of Ohio pass upon that question. There is, therefore, no jurisdiction for review of that which has not yet been presented nor decided by the lower court.

**This Court Lacks Jurisdiction of That Portion of the Appeal Which Attacks the License Fee Provisions of the Ohio Statute as an Unconstitutional Tax for the Reason That the Judgment of the Supreme Court of Ohio upon This Portion of the Appeal Is Based upon an Adequate and Independent Non-Federal Ground.**

On page 14 of the opinion of the Supreme Court of Ohio, as it is attached to appellant's Statement As To Jurisdiction herein, the Court said:

> "Besides the plaintiff paid the fee for inspection without protest and does not seek its recovery. Neither has it enjoined the levy of the fee as it could do, if it were illegal, under the provisions of Section 12075, General Code. Under such circumstances, *the plaintiff is estopped in this action to complain on this point.*" (Emphasis added.) Citing Cases.

(See Page 26 of Appellant's "Statement as to Jurisdiction.")

Not only did appellant fail to take advantage of all proper remedies to raise the question of the tax before the Ohio courts, but in this action paid the fee in question without any protest at all. This, the Ohio Court held, estopped the appellant from questioning the constitutionality of the license fee in this action. Ohio law is well settled on this principle of estoppel. *State on Application of Alter* v. *Bader et al.* 56 Ohio St., 718. Although the Ohio court viewed the fee as being a valid one, it clearly applied an estoppel to appellant. Thus, though a federal ground may have been involved, the decision of this portion of the appeal can clearly be sustained on the adequate and independent non-federal ground of estoppel, *Fox Film Corp.* v. *Muller*, 296 U.S., 207, and there is no jurisdiction for review.

**There Is No Jurisdiction of the Remaining Issues Raised by the Appeal for the Reason That There Are No Substantial Federal Questions Involved.**

The remaining issues raised by the appeal were decided by the Supreme Court of Ohio within a clear framework of constitutional interpretation as established by the Supreme Court of the United States.

1. The decision in the *Burstyn* case, *supra.* clearly acknowledges the power of the State of Ohio to maintain, within permissible limits, a licensing system for the display of motion pictures. See also *Commercial Pictures Corporation* v. *The Regents of the University of the State of New York* (New York Court of Appeals No. 371) —— N. Y. ——.

2. The standards established by statute for the Ohio licensing system have been specifically approved by the Supreme Court of the United States. *Mutual Film Corp.* v. *Industrial Commission of Ohio,* 236 U. S., 230. There is no question but that the portion of the *Mutual* decision applicable in this instance was not overruled by the *Burstyn* decision. Not only in the concurring opinion to the *Burstyn* decision, but also in the Court's opinion in *Winters* v. *New York,* 333 U. S., 507, at 518 the Supreme Court of the United States has indicated that the *Mutual* decision was a guide post to the definiteness which attains "precision from the sense and experience of men". Further, as has already been pointed out, the Supreme Court of Ohio has held that the sense and experience of forty years of administration and litigation has limited the statute to a standard of the obscene, the immoral or that which tended to promote crime or riot. The decision appealed from, in this regard, follows precisely the course charted by the Supreme Court of the United States, and the question raised, therefore, is entirely insubstantial.

3. It would seem to be equally true that the Supreme Court of the United States in the decision of the *Burstyn* case recognized the imperative necessity for allowing a state to protect itself from the social disintegration which can flow from a constant exhibition of the obscene, the immoral or subjects which tend to promote crime or riot. Appellee submits that this Court has recognized that the unique nature of the impact of the motion picture, the unique nature of the audience subjected to that impact, and the subjects condemned by the standards of the statute make the motion picture subject to unique regulation. It is worth noting that the experience of Ohio in the last decade with the present licensing system, as shown by *Stipulation No. 7* (R.), shows almost 18,000 motion pictures approved, fifty-nine rejected. Of these latter, fifteen have been re-examined and approved. This in itself is a reflection of a carefully administered system designed to protect both free expression and a moral society.

Wherefore, appellees respectfully move that the within appeal be dismissed or that the judgment and decree of the Supreme Court of the State of Ohio be affirmed.

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